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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 730

ROBERT M. SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) has not yet been officially reported.[1] The district court did not write an opinion.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. A26) was entered on August 14, 1968, and the Court

[1] The opinion was amended, however, subsequent to the filing of the Petition. On November 25, 1968, Circuit Judge Wright ordered that footnote 1 of his concurring opinion be struck.

denied a petition for rehearing on October 15, 1968 (Pet. App. A27). The petition for a writ of certiorari was filed on November 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the investigation of Ku Klux Klan organizations by a Subcommittee of the House Un-American Activities Committee was authorized.

2. Whether the Subcommittee's subpoena directing petitioner to produce corporate records of the Klan was so broad as to constitute an unreasonable search.

3. Whether petitioner was adequately apprised of the pertinency of the documents which he refused to produce.

4. Whether a claim of the personal privilege against self-incrimination relieved petitioner of his duty to produce corporate records which he held in his representative capacity as an officer.

STATUTE, RULE AND RESOLUTIONS INVOLVED

2 U.S.C. 192 and Rule XI of the Rules of the House of Representatives are set forth at pp. 5–6 of the petition.

House Resolution 310, 89th Congress, 1st Session, provides in pertinent part (111 Cong. Rec. 8020):[2]

> *Resolved,* That effective April 1, 1965, additional expenses of conducting the investigations authorized by section 18 of rule XI of the Rules of the House of Representatives, incurred by

[2] The quoted language on p. 12 of the petition is taken from the Committee resolution, rather than from H. Res. 310 as petitioner indicates.

> the Committee on Un-American Activities, acting as a whole or by subcommittee, in investigating the Ku Klux Klan organizations in the United States, for the purpose of aiding the Congress in the consideration of any necessary remedial legislation, not to exceed $50,000 * * * shall be paid out of the contingent fund of the House on vouchers authorized by said committee * * *.

A resolution adopted unanimously by the House Committee on Un-American Activities on March 30, 1965, provides:[3]

> WHEREAS, at the commencement of the 89th Congress the Chairman instructed the staff to commence a preliminary inquiry into the activities of the Ku Klux Klan organizations in the United States to assist the Committee in determining whether it should authorize an investigation of the Klan organizations; and
>
> WHEREAS, the Committee on February 2, 1965, by resolution, unanimously directed the Chairman to continue the preliminary inquiry; and
>
> WHEREAS, the Chairman has today made a report to the Committee on the results of this preliminary inquiry, which report clearly indicates that the nature and scope of the Klan organizations' activities are such that the Committee should authorize an investigation; and
>
> WHEREAS, the President's recent public appeal also demonstrates that such an investigation is justified and necessary; and
>
> WHEREAS, the President has offered the full cooperation of the Executive Branch of

[3] H.Rep. No. 1241, 89th Cong., 2d Sess., 4–5, 45.

the Government in such an investigation; now therefore,

BE IT RESOLVED, that the Committee undertake an investigation of the various Klan organizations and their activities with the view of holding hearings for the purpose of aiding Congress in any necessary remedial legislation; and

BE IT FURTHER RESOLVED, that inasmuch as the appropriation for the Committee's work for this session is not sufficient to enable it to undertake this investigation in addition to other investigations already approved and under way, the Chairman is directed to request a supplemental appropriation of $50,000 to conduct an investigation of Ku Klux Klan organizations; * * *

STATEMENT

Petitioner was convicted by a jury, in the United States District Court for the District of Columbia, of contempt of Congress, in violation of 2 U.S.C. 192. He was sentenced to one year's imprisonment and fined one thousand dollars. The court of appeals affirmed (Pet. App.).

1. The indictment alleged that petitioner had failed and refused to produce, pursuant to a subpoena *duces tecum*, corporate records of the Invisible Empire, United Klans, Knights of the Ku Klux Klan of America, Inc., and certain affiliated organizations at a hearing before a Subcommittee of the House Un-American Activities Committee held in Washington on October 20, 1965. The hearing at which petitioner was summoned to testify and to produce documents was

the initial public hearing pursuant to an investigation which the Committee authorized on March 30, 1965, after reviewing the results of a preliminary staff inquiry of the activities of Ku Klux Klan organizations (Govt. Ex. 9, "Proceedings Against Robert M. Shelton," H.Rep. No. 1241, 89th Cong., 2d Sess., pp. 4, 45, hereinafter cited as Proceedings). The Committee resolved "to undertake an investigation of the various Klan organizations and their activities with the view of holding hearings for the purpose of aiding Congress in any necessary remedial legislation" and to request a supplemental appropriation of $50,000 for the investigation (*supra*, pp. 3–4). On April 14, 1965, the House, after extensive debate in which some members objected that the proposed investigation was within the jurisdiction of other committees, appropriated the additional funds to pay the expenses of "investigating the Ku Klux Klan organizations in the United States" (*supra*, pp. 2–3).

Prior to the scheduling of public hearings, a staff investigator of the Committee interviewed petitioner at the offices of the United Klans of America in Tuscaloosa, Alabama (Tr. 86–88). Petitioner identified himself as the Imperial Wizard of the United Klans, a corporation chartered under the laws of Georgia (*ibid.*; see Proceedings pp. 36–37). In view of the extensive powers of the Imperial Wizard (the chief executive officer) over the corporation's affairs, the Subcommittee appointed to hold hearings in connection with the investigation subpoenaed petitioner to appear as a witness on October 19, 1965 (Proceedings

pp. 1–3, 39–42; Tr. 20–22). The subpoena required petitioner to produce the following documents (Proceedings pp. 2–3; Pet. App. A20–A21):

> (1) All books, records, documents, correspondence, and memoranda relating to the organization of and the conduct of business and affairs of the Invisible Empire, United Klans, Knights of the Ku Klux Klan of America, Inc., also known as the United Klans of America, Inc., Knights of the Ku Klux Klan, and affiliated organizations, namely, the Alabama Rescue Service, United Klansmen of America, Whiteman's Defense Fund, Christian News Service, in your possession, custody or control, or maintained by or available to you as Imperial Wizard of the Invisible Empire, United Klans, Knights of the Ku Klux Klan of America, Inc., also known as the United Klans of America, Inc., Knights of the Ku Klux Klan.
>
> (2) All books, records, documents, correspondence, and memoranda in your possession, custody or control, or maintained by or available to you, in your capacity as Imperial Wizard of the United Klans of America, Inc., Knights of the Ku Klux Klan, which the "Constitution and Laws" of said organization authorize and require to be maintained by you and any other officer of said organization, the same being in your possession, custody or control.
>
> (3) Copies of unexecuted forms relating to applications for membership, application and issuance of charters; copies of Constitutions and By-Laws; manuals; and unexecuted forms and documents used by Kligrapps (Imperial, Realm and Klan or Klavern), Grand Dragons

(Realm), Kleagles (Imperial, Realm, Province, and Klan or Klavern); all of which are in your possession, custody or control, or available to you as Imperial Wizard of the Invisible Empire, United Klans, Knights of the Ku Klux Klan of America, Inc., also known as the United Klans of America, Inc., Knights of the Ku Klux Klan, and its affiliated organizations, the Alabama Rescue Service and United Klansmen of America, and which are used in connection with the business and affairs of said organizations.

(4) Copies of U.S. Treasury Department, Internal Revenue Service, Form 1120, "U.S. Corporation Income Tax Return", for the fiscal years 1961 through June 30, 1965, filed by you as President and/or Imperial Wizard, United Klans of America, Knights of the Ku Klux Klan, Inc., with the U.S. Treasury Department, Internal Revenue Service.[4]

Petitioner appeared before the Subcommittee with counsel on October 19, 1965, and, after stating his name and date and place of birth, refused to answer any questions on the ground that his answers might tend to incriminate him (Proceedings pp. 9–27). He also refused to produce any documents required by the subpoena on the grounds that the "information is not relevant nor germane to the subject under investiga-

[4] A fifth paragraph directed petitioner to produce individual income tax returns for the years 1958 through 1964. Petitioner's refusal to produce these documents was not considered by the Committee as a basis for the contempt citation (Proceedings p. 3).

tion, and the same would not aid the Congress in the consideration of any valid legislation * * *" and that "I honestly feel that any such material might tend to incriminate me in violation of my rights as guaranteed to me under amendments 5, 1, 4, and 14 of the Constitution * * *" (Proceedings pp. 14–19).

As directed by the Subcommittee, petitioner returned as a witness on the following day, October 20, and again refused to answer all questions on self-incrimination grounds (Proceedings pp. 28–31). The Chairman then directed petitioner's attention to the Chairman's opening statement, in which he set out in some detail the matters of particular concern to the Subcommittee in its consideration of appropriate legislation, and the hearing was recessed to give petitioner and his counsel an opportunity to review the statement (Proceedings pp. 32–33, 4–8; see p. 15, *infra*). Although the Chairman advised petitioner that the subpoenaed documents were pertinent to the Subcommittee's inquiry and that the subpoena was directed to him solely in his capacity as an officer or representative of the organizations, petitioner reiterated his blanket refusal to produce any documents, stating (Proceedings pp. 34–35):

> Sir, I respectfully decline to deliver to this committee any and all records as requested by this committee under subpena dated October 7, 1965, for that information is not relevant and germane to the subject under investigation, and the same would not aid the Congress in the consideration of any valid remedial legislation,

> nor is such inquiry within the scope of that authorized to be investigated by Rule [XI] of the rules adopted by the 89th Congress, of House Resolution 8 adopted January 4, 1965.
>
> I respectfully decline to turn over these documents in question for the reason that I honestly feel my answer might tend to incriminate me * * * in violation of my rights as guaranteed to me by amendments 5, 1, 4, and 14 of the Constitution of the United States of America.

2. At trial, petitioner expressly waived any defense based upon his personal privilege against self-incrimination (Tr. 110–111). After oral argument, however, the court of appeals appointed Mr. Thurman Arnold to submit a brief as *amicus curiae* and the amicus brief was limited to the question whether the custodian of a corporation's records may invoke his personal privilege against self-incrimination as a ground for refusing to produce such records. The court of appeals rejected the argument presented that the privilege should be available under the principles of its recent decision that the Communist Party could assert the privilege of its members in its prosecution for failure to register under the Subversive Activities Control Act.[5] Upon careful consideration, the court of appeals also rejected petitioner's attacks upon the authorization of the investigation, the breadth of the subpoena and the relevance of the documents subpoenaed, as well as other contentions not raised in this Court.

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[5] *Communist Party* v. *United States*, 384 F. 2d 957 (C.A.D.C.).

The court of appeals affirmed petitioner's conviction and subsequently denied his petition for rehearing en banc.

ARGUMENT

1. Relying on *Watkins* v. *United States,* 354 U.S. 178, petitioner contends (Pet. 14–16) that the Subcommittee's investigation was not authorized with sufficient specificity and did not relate to "un-American" activities within the meaning of House Rule XI, Section 18(b), which delimits the investigative authority of the Un-American Activities Committee. In *Watkins,* the Court found that the language of Rule XI, by itself, was too imprecise to give a witness proper assurances of the committee's authority to conduct the investigation and of the legislative purpose which justified the disclosures sought; the witness, who was not otherwise properly advised of the pertinency of the questions to the subject under inquiry, "was thus not accorded a fair opportunity to determine whether he was within his rights in refusing to answer" (354 U.S. at 203–206, 215). In the present case, however, Rule XI is not the only source of congressional authority to conduct the investigation.

The investigation of the Klan was specifically authorized by the Committee after a preliminary staff inquiry, and the proposed investigation was thereafter brought to the attention of the House, which endorsed it by appropriating funds specifically for it. The language of the House Resolution plainly constitutes specific authorization for the investigation and refutes

the contention that it was beyond the Committee's jurisdiction.

The appropriation resolution covered the "expenses of conducting the investigations authorized by section 18 of rule XI of the Rules of the House * * * in investigating the Ku Klux Klan organizations in the United States, for the purpose of aiding the Congress in the consideration of any necessary remedial legislation * * *." As the court below noted, the House Resolution was passed after "extensive debate," in which the Committee Chairman argued that the type of Klan activities disclosed by the staff inquiry came within the Committee's charter and suggested some possible legislative approaches to the problem (Pet. App. A5, A7–A8). The House rejected the objections of some members that the proposed investigation was within the jurisdiction of other committees and that there was no need for an investigation because existing laws were adequate to deal with any abuses arising from Klan activities.

Thus, petitioner here, unlike the witness in *Watkins*, was asked to cooperate with the Congress only after "a clear determination by the House * * * that [the] particular inquiry [was] justified by a specific legislative need" (*Watkins* v. *United States, supra,* 354 U.S. at 205). As the Court of Appeals held, "The vagueness which fatally characterized the situation in *Watkins* does not appear" (Pet. App. A7). And all of the requirements set forth in *Gojack* v. *United States,* 384 U.S. 702, were specifically fulfilled.

Petitioner's challenge to the breadth of the investigation—"Klan organizations and their activities"—is no defense to his contempt. Petitioner does not dispute the court of appeals' finding that the purpose of the investigation was within the legislative function (Pet. App. A5–A9; see *McGrain* v. *Daugherty,* 273 U.S. 135, 174; *Watkins* v. *United States, supra,* 354 U.S. at 187). Congressional committees are not precluded from investigating such generally defined subjects; such a limitation would seriously interfere with a Committee's efforts to define the nature and scope of a legislative problem. Such prior specificity is particularly impossible where the subject is the organization and activities of a clandestine group like the Klan. See *Townsend* v. *United States,* 95 F. 2d 352, 361 (C.A.D.C.). While the scope of the investigation may be relevant to the question whether the witness was adequately apprised of the pertinency of the disclosures sought, petitioner was fully advised, as we argue *infra,* pp. 14–16, of the pertinency of the subpoenaed documents at the hearing.

2. The court below correctly held that this Court's decision in *McPhaul* v. *United States,* 364 U.S. 372, negates petitioner's contention that the subpoena was so broad as to violate the Fourth Amendment's prohibition against unreasonable searches and seizures (Pet. App. A11–A14). In *McPhaul,* the Court rejected a Fourth Amendment challenge to a subpoena requiring production of "all records, correspondence and memoranda pertaining to the organization of, the

affiliation with other organizations and all monies received or expended by the Civil Rights Congress" on the ground that, in view of the broad scope of the investigation, the subpoena described the documents "'with all of the particularity the nature of the inquiry and the [Subcommittee's] situation would permit'" (364 U.S. at 374, 382, quoting from *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 210 n.48). The scope of the subpoena in this case was justified by the subject of the Subcommittee's inquiry: to determine the organization and purposes of the Klans and the type of activities in which they engage (see pp. 14–15 *infra*). Without knowing precisely what books and records were maintained by the Klan in petitioner's control or available to him, the subcommittee could only specify "with reasonable particularity the subjects to which the documents * * * relate" (*Brown* v. *United States*, 276 U.S. 134, 143).

Moreover, as the court below held, following this Court's decision in *McPhaul*, petitioner's failure to object to the breadth of the subpoena before the Subcommittee, coupled with his wholesale refusal to comply, precludes his reliance upon that defense in court. This Court said in *McPhaul* (364 U.S. at 382):

> If petitioner was in doubt as to what records were required by the subpoena, or found it unduly burdensome, or found it to call for records unrelated to the inquiry, he could and should have so advised the Subcommittee, where the defect, if any, "could easily have been remedied," *United States* v. *Bryan*, [339 U.S. 323,] 333.

3. The record plainly refutes petitioner's contention (Pet. 17–18) that he was not adequately advised of the pertinency of the subpoenaed documents to the subject of the Subcommittee's inquiry. At the outset of the hearing at which petitioner was called to testify, the Chairman delivered a lengthy opening statement in which he detailed the background of the inquiry, including the House Resolution, and quoted the Committee resolution authorizing "an investigation of the various Klan organizations and their activities * * * for the purpose of aiding Congress in any necessary remedial legislation." The Chairman's statement specifically delineated the questions which were of particular concern to the Subcommittee (Proceedings pp. 5–6):

> What must Congress know to determine whether legislation is called for in this area and, if so, what type legislation will be effective?
>
> It must know the objectives and purposes of the Ku Klux Klans, their structure and organizations, their affiliated organizations, and groups created or controlled by them or organized to support, defend, and assist them. The Congress must know their constitutions and bylaws, the type of activities in which they engage, how they are controlled, who their key officers are, how Klan groups are financed, and what their funds are used for. It must know whether the Klans subscribe to—and use—illegal means to achieve either declared or concealed objectives. The Congress must know

> whether the operations and actions directed and carried out by Klan leaders and certain members are in accord with the wishes of the membership as a whole, or whether certain activities are engaged in without the knowledge and approval of the membership. It must know whether Klan recruits are informed of the true nature and purposes of the Klans—or whether they are hoodwinked into joining them. It must also know, of course, something of the size, strength, and scope of the Klan movement. These are the matters which are the subject of this inquiry.

The Subcommittee's questions, which petitioner refused to answer, were directed to petitioner as an officer of the incorporated Klans and related almost entirely to the organization and financial structure of the Klans. When petitioner persisted in his refusal to comply with the subpoena *duces tecum,* the Chairman directed petitioner's attention to the opening statement and recessed the hearing to give petitioner and his counsel an opportunity to review the statement (Proceedings pp. 32–33). Petitioner thereafter reiterated his refusal to produce the subpoenaed documents, notwithstanding the Chairman's admonition that the Subcommittee could not understand "how anyone could argue, after reading the committee resolution * * * and my opening statement * * * that papers and documents pertaining to the structure and organization, incorporation, finances, corporate tax returns and so forth, of each * * * Klan orga-

nization are not pertinent to this inquiry" (Proceedings p. 32).[6]

Thus, there is no question either that the documents requested were pertinent, or that petitioner was amply advised of their pertinency. The case differs markedly from *Deutch* v. *United States,* 367 U.S. 456, upon which petitioner relies.

4. The subpoena *duces tecum* and the demand of the Subcommittee to produce the corporate documents were directed to petitioner as an officer of the United Klans, a Georgia corporation whose annual registration statement listed petitioner as its president (Proceedings pp. 10–12, 36–37). In *McPhaul* v. *United States, supra,* 364 U.S. at 380, this Court reaffirmed the rule that:

> The Fifth Amendment did not excuse petitioner from producing the records of the Civil Rights Congress, for it is well settled that "[b]ooks and records kept 'in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the

[6] This statement and the Chairman's earlier statement that "these documents called for are very relevant, very pertinent, very appropriate and essential in connection with this investigation" (Proceedings p. 14) refute petitioner's claim (Pet. 18) that the subcommittee did not know whether the documents were pertinent. The Chairman's statement quoted by petitioner (Pet. 10) only recognizes the fact that the full impact of subpoenaed documents on an inquiry cannot be known until the documents are produced.

> papers might tend to incriminate [their keeper] personally.' *United States* v. *White,* 322 U.S. 694, 699 (1944)." *Rogers* v. *United States,* 340 U.S. 367, 372. And see *Curcio* v. *United States,* 354 U.S. 118, 122–123. [7]

See also *Campbell Painting Corp.* v. *Reid,* 392 U.S. 286.

Petitioner seeks to avoid this settled principle by arguing, as did the *amicus* in the court below, that the personal privilege is available to a corporate officer where the investigating authority proceeds on the "assumption" that the organization constitutes a criminal conspiracy (Pet. 18–19).

The court below correctly distinguished its prior holding in *Communist Party* v. *United States,* 384 F. 2d 957 (C.A.D.C.), on the ground that the "substantial threat of prosecution" which the organization's officers risked in that case was not present here: "No such direct criminal liability attaches to leadership or membership roles in the Ku Klux Klan" (Pet. App. A21–A22).[8] The principle of that case could not properly be used to justify petitioner's blanket refusal to disclose any of the records of the corporation he represents.

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[7] Since petitioner here was unquestionably the principal officer of the Klan, and since no issue is raised as to the availability to him of the documents sought, the concerns which prompted the dissenting opinion in *McPhaul* are not present in this case.

[8] As to this point, Judge Wright's concurring opinion spoke for a majority of the panel of the court of appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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